

B4

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: [REDACTED]

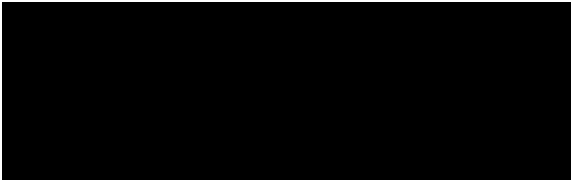
Office: VERMONT SERVICE CENTER

Date: JUN 29 2004

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

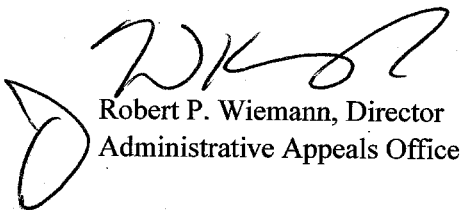
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based visa petition. Upon subsequent review, the director properly issued a Notice of Intent to Revoke, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Delaware in December 1982. It imports dinnerware and wholesales the product to retailers. It seeks to employ the beneficiary as its vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director initially approved the petition on July 3, 2000. Upon subsequent review, including review of information received in conjunction with an L-1A intracompany transferee extension petition, the director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. After properly issuing a Notice of Intent to Revoke, the director revoked the approval of the petition on November 15, 2002.

On appeal, counsel for the petitioner asserts that the director's decision was based on errors of fact and law, negligence, and possibly bad faith.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Moreover, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a Notice of Intent to Revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Esteime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, supra (BIA 1988)(citing *Matter of Esteime*, 19 I&N 450 (BIA 1987)).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in an executive capacity for the United States entity. The petitioner in its October 22, 1999 letter appended to the petition stated that the beneficiary "currently works in an executive capacity" for the petitioner. On appeal, counsel for the petitioner confirms that the petitioner is requesting that the beneficiary's position be considered as an executive position. The AAO will consider the record for the petitioner's compliance with the statutory requirements of "executive capacity."

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and

- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the October 22, 1999 letter accompanying the petition, the petitioner stated:

As Vice President of [the petitioner], reporting only to the president, [the beneficiary] has discretionary authority, power and control of [the petitioner's] operations and development. She is empowered to make all personnel decisions. She is responsible for planning, developing and implementing [the petitioner's] policies, business strategies, goals and marketing objectives. She continues to be in charge of reviewing, analyzing and approving legal documents, investment proposals and joint venture agreements, as well as sales reports, market surveys, production reports, economic forecasts and financial statements in order to make efficient and effective decisions.

Her responsibilities include attending [the parent company's] Board of Directors meetings in the PRC to update the board members on [the petitioner's] operations, developments and markets. Therefore, she travels frequently to the PRC. She acts as the chief coordinator with [the parent company] in planning and implementing the future direction of [the petitioner] and other business opportunities in North America.

The petitioner's organizational chart showed the beneficiary as executive vice-president reporting to the chief executive officer. The chart also listed a "vice president [redacted] Inc./president [redacted] Division;" a "vice president [redacted] Inc./chief financial officer;" and, a "vice president [redacted] Inc./president, Centrum Corp.," on the organizational tier directly below the beneficiary's position. The organizational chart also identified individuals in the positions of production manager, traffic manager, and customer service clerk, as well as other employees, reporting to the "vice president, [redacted] Inc./president, [redacted] Division."

The petitioner included its 1998 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The 1998 IRS Form 1120, Schedule E Statement indicated the officers' compensation in pertinent part as:

Chief Executive Officer	-	\$404,613
Vice-President, Tienshan, Inc./President, Tienshan Division	-	\$320,597
Vice-President, Tienshan, Inc./President Centrum Corp.	-	\$198,417
Chief Financial Officer	-	\$143,384
Executive Vice-President (the beneficiary's position)	-	\$75,261

¹ The petitioner claims Centrum Corp. is its wholly owned subsidiary. The petitioner states that it shares corporate offices with Centrum Corp. and demonstrates that it includes Centrum Corp in its Internal Revenue Service (IRS) corporate filings.

The director approved the petition based on this information.

Upon subsequent review of the record, including the response to the director's request for further evidence in regard to the petitioner's L-1A extension petition, the director issued a Notice of Intent to Revoke and requested: (1) a detailed description of the beneficiary's executive/managerial duties in the United States, including a breakdown of the number of hours that are devoted to each of the duties on a weekly basis; (2) additional evidence showing the management structure and personnel structure of the United States entity, including the positions the beneficiary managed; (3) information regarding the number of supervisors, job titles, and job duties of the employees subordinate to the beneficiary; (4) evidence of the United States organization's staffing, including copies of the 1999 IRS Forms W-2, Wage and Tax Statement, along with copies of the 1999 payroll roster; and, (5) copies of the petitioner's 1999 IRS Forms 1120.

In response, the petitioner stated that the beneficiary directed the following functions:

[The parent company's] Interface

Responsible for:

- Keeping China Parent informed of [the petitioner's] activities
- Providing [the petitioner] with [parent company's] decisions

Global Sourcing/Purchasing

Responsible for:

- All product purchased from China
- For all product purchased (approximately \$9 million annually)
- Determine which factory to source the product from
- Including interfacing with factory to
 - Negotiate Price
 - Negotiate Delivery
 - Negotiate terms
 - Resolve any production questions/issues
- Includes purchasing of all boxes and stickers

Import Activities

Responsible for:

- Selecting carrier
- Scheduling Shipments
- Negotiating rates and terms for carriers, brokers, etc.
- Clearing all shipments with customs and FDA
- Duty Rates – including interfacing with Customs

Chinese Accounting Activities

Responsible for:

- Intercompany Accounting between China and [the petitioner]
- Payment to Chinese factories

[REDACTED]

The petitioner also noted that the beneficiary was one of four members of the petitioner's senior management team and that the beneficiary represented the parent company in all of the petitioner's decisions regarding staffing, leases, review of customer contracts, review of company financial statements and business decisions, and involvement in bank negotiations.

The petitioner also provided a revised organizational chart dated July 23, 2002. The revised chart depicted the beneficiary in the position of executive vice-president. The chart also showed the individual previously identified as "vice president, [REDACTED] Inc./president, [REDACTED] Division," and the position of chief financial officer on the same tier. The revised chart listed the positions of production coordinator (previously production manager), import manager (held by the individual previously identified as the traffic manager), and import assistant (held by the individual previously identified as the customer service clerk) as the three employees subordinate to the beneficiary.

The petitioner provided job descriptions for the individuals under the beneficiary's supervision. The petitioner indicated the production coordinator: placed production orders with factories and vendors in China; entered purchase orders on the computer; placed photo box orders and negotiated prices with printing factory; maintained files for products imported and pertaining to all purchasing activities; communicated with factories and vendors regarding packing; coordinated with designers and factories to obtain samples; reviewed freight bills; coordinated with customers and factories to handle problems; and, assigned UPC (Uniform Pricing Codes).

The import manager's duties included: communicating with the bank and customers on financial instruments; communicating with freight forwarders; coordinating the number of cartons per container; coordinating booking of shipments from China; negotiating with steamship lines for freight and approving payment for shipping; clearing customs; assigning duty classifications on imports; and reviewing and submitting documentation for customs and FDA (Food and Drug Administration) clearance. The import assistant's duties included: verifying price and quantities and approving payment to Chinese factories; inputting all new products into the computer system; making wire transfers; reconciling intercompany balances between the petitioner and Chinese offices; reviewing and approving expenses for two Chinese offices; and maintaining all records and files pertaining to job responsibilities.

The petitioner also provided its 1999 IRS W-2 Forms issued to its employees and its 1999 IRS Form 1120, U.S. Corporation Income Tax Return. The 1999 IRS Form 1120, Schedule E Statement indicated the officers' compensation in pertinent part as:

Chief Executive Officer	-	\$245,290
Vice-President, [REDACTED] Inc./President, [REDACTED] Division	-	\$329,438
Vice-President, [REDACTED] Inc./President Centrum Corp.	-	\$159,233
Chief Financial Officer	-	\$147,516
Executive Vice-President (the beneficiary's position)	-	\$82,692

The director stated that: (1) the petitioner had employed 21 staff when it filed the petition; but had reduced the number of staff to 18 when the rebuttal to the Notice of Intent to Revoke was filed; (2) the petitioner had not provided evidence that it employed the individual in the position of production coordinator in the year 1999; (3) the description of the beneficiary's duties was vague; and, (4) the staff members in the beneficiary's department appeared to be performing the mundane duties of the organization. The director concluded that the petitioner had not established that the beneficiary would actually function at a senior level and had not established that the beneficiary would be involved in the supervision and control of work of other supervisory, professional, or managerial employees who would relieve her from performing the services of the corporation.

On appeal, counsel for the petitioner: (1) submits a document showing the change in positions from 1999 to 2002 and asserts that the size of the petitioner is irrelevant and does not limit the use of the intracompany visa; (2) explains that the production coordinator Americanized her legal first name, her American first name appears on the organizational chart and her legal first name appears on the 1999 Form W-2; (3) asserts that the petitioner had submitted evidence of the beneficiary's executive capacity and submits new evidence showing the beneficiary is both a corporate director and officer; and, (4) asserts that the beneficiary's duties are executive, thus the discussion of the staff members regarding their managerial, executive, or professional capacity is irrelevant. Counsel also requests estoppel of this revocation based on the director's negligence in forwarding the L-1A extension denial to the AAO. Counsel also alleges the director possibly acted in bad faith by stating that the denial of the nonimmigrant L-1A extension petition had recently come to the director's attention.

First, the AAO observes that like the Board of Immigration Appeals, the AAO is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The AAO's jurisdiction is limited to the authority specifically granted by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

Second, the AAO acknowledges that the director's decision is inarticulate and focuses on factual inconsistencies that have been easily explained or otherwise reconciled. For example, the AAO accepts the explanation that the production manager/coordinator has used an American version of her first name. Likewise the AAO accepts that companies may increase or decrease the number of personnel over a period of time. However, the AAO does not find counsel's assertion regarding the beneficiary's executive capacity persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The petitioner's initial description of the beneficiary's duties paraphrased portions of the definitions of managerial and executive capacity. For instance, the petitioner depicted the beneficiary as "planning, developing and implementing [the petitioner's] policies, business strategies, goals and marketing objectives,"

[REDACTED]

and having "discretionary authority, power and control of [the petitioner's] operations and development," and "empowered to make all personnel decisions." See 101(a)(44)(A)(iii) and 101(a)(44)(B) (ii) and (iii) of the Act. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner provided general statements indicating the beneficiary would be "in charge of reviewing, analyzing and approving legal documents, investment proposals and joint venture agreements, as well as sales reports, market surveys, production reports, economic forecasts and financial statements in order to make efficient and effective decisions." The petitioner does not, however, further define the extent of the beneficiary's involvement in these tasks and does not clarify who actually prepares the proposals, agreements, sales reports, market surveys, production reports or economic forecasts. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, *supra*.

Further, the initial description indicates that the beneficiary acts as the chief coordinator between the parent company and the petitioner. This information suggests that the beneficiary may be acting primarily as the parent company's agent or liaison with the petitioner. Such a position is not an executive position. Furthermore, the petitioner's placement on the original organizational chart and her salary in comparison to the salaries of individuals subordinate to her on the organizational chart are incongruous. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, *supra*.

Moreover, the petitioner's more detailed description in rebuttal suggests that a portion of the beneficiary's duties encompass operational duties. The petitioner states that the beneficiary is responsible for "determining which factory to source the product from including interfacing with the factory to negotiate price, negotiate delivery, negotiate terms, [and] resolve any production questions/issues." The petitioner further states that the beneficiary is responsible for "selecting carrier, scheduling shipments, negotiating rates and terms for carriers, brokers, etc. clearing all shipments with customs and FDA." An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner asserts that the beneficiary's duties are executive but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as observed above, do not fall directly under traditional executive duties as defined in the statute. The AAO notes further, that the director specifically requested a breakdown of the time the beneficiary spent on each of her duties but the petitioner failed to allocate the beneficiary's time spent on various functions. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). For these additional reasons, the AAO cannot determine that the beneficiary's

function is primarily executive. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Finally, the inconsistencies between the beneficiary's placement on the initial organizational chart and the revised organizational chart cannot be ignored. In the initial chart the beneficiary is incongruously placed over the president of the [REDACTED] Division who is compensated at a significantly higher salary than the beneficiary. On the revised organizational chart the beneficiary is placed on the same tier as the president of the [REDACTED] Division and supervises three individuals previously supervised by the president.² It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho, supra*. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this matter, the record does not contain credible evidence that either organizational chart represents the petitioner's actual organizational structure and managerial hierarchy.

Although it appears that the beneficiary's responsibilities and the duties of the production coordinator, import manager, and import assistant overlap to some degree, the record does not present sufficient evidence to establish that the beneficiary's duties in relation to the other employees are primarily executive. The inconsistencies in the record preclude a conclusion that the beneficiary's assignment is to primarily direct the management of a function of the organization, rather than to perform tasks to implement the function.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original). In this matter, the petitioner has not provided sufficient consistent evidence to establish that the beneficiary's role in the organization is primarily executive. The record shows that the beneficiary provides operational services, acts as a liaison or agent for the parent company, and spends an unstated amount of time on non-qualifying day-to-day functions. Counsel's submission of evidence showing the beneficiary is a corporate director and officer do not aid in an understanding of the beneficiary's daily duties.

The AAO observes that counsel's assertion that the petitioner's size is irrelevant is incorrect. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees

² Again, the petitioner presents inconsistent information. The revised organizational chart shows the beneficiary as a first-line supervisor over three employees; yet the petitioner does not include supervision of others as one of the beneficiary's daily tasks.

who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In sum, the record does not contain sufficient consistent credible evidence to overcome the director’s conclusion in this matter.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.